

## State of New Hampshire

### PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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John Stark Support Personnel Association  
NEA-New Hampshire  
Complainant

v.

John Stark Regional School District  
Respondent

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Case No. M-0778

Decision No. 2001-030

Representing the John Stark Support Personnel Association/ NEA-NH (Petitioner)

W.B. Cumings – Uniserv Director, Capital Region

Representing the John Stark Regional School District (Respondent)

Douglas S. Hatfield, Esquire

Also appearing : Arthur Aaronson, Principal

### **BACKGROUND**

The John Stark Support Personnel Association/NEA-New Hampshire, (hereinafter referred to as the "Association") filed a Petition for Certification with the Public Employee Labor Relations Board (hereinafter referred to as the "PELRB") on March 13, 2001 proposing creation of a single bargaining unit comprised of all full time and part time non-certified employees of the John Stark Regional School District (hereinafter referred to as the "School District") in the positions of Aides, Teacher Assistants, Custodians, Food Service Employees, and Secretaries/clerks. On that same day, the PELRB forwarded a "Notice of Filing" to the School District to the attention of its Superintendent. On March 29, 2001 the School District filed its objection to the petitioner's requested unit composition and asked the PELRB to exclude the position of Food Service Director and any part-time employees working less than eighty (80) percent

of the time worked by full-time employees. The parties were notified in writing by the PELRB on April 2, 2001 of an evidentiary hearing to be conducted on April 18, 2001.

A hearing on the matter was held before the undersigned hearing officer on April 18, 2001. At the commencement of the hearing, the Association, by oral motion of its representative, indicated that it wanted the proceeding continued and stated as its basis that the School District did not provide advance information "as to the points of argument, facts or precedent of law upon which [its] objection is based and that [it]...may otherwise raise at this hearing". The Association further indicated that it needed additional information to be provided by the School District and additional time to prepare its responsive case to the School District's request for exclusions. Further, the Association representative declared that its only planned witness, the Food Service Director, would not be present due to last minute work demands requiring her to stay at the work site. The School District objected to the request for a continuance based upon the failure of prior notice, its own presence at the hearing with witnesses and the content of previous telephone discussions with the Association representative wherein the basis for its objections to the certification of certain employees within the proposed unit were discussed and that no earlier requests for any information were made upon it by the Association's representative. The School District then proceeded to outline its case and the essence of the testimony for the benefit of the Association.

The Hearing Officer indicated his intent to recess to allow the parties to have the opportunity to informally discuss their respective positions and decide whether they wanted the hearing to go forward. The record indicates that the Association representative responded that, "I see no reason not to go forward." and "I'll withdraw my continuance." The School District representative responded that "I would not object to allow the record to stay open to allow an affidavit of the Food Service Director." The hearing was briefly recessed to allow further discussion between the representatives regarding this proceeding. The hearing was reconvened and the record indicates that the School District representative stated "We are going forward. There is no agreement on the Food Service Director." The Association representative agreed. At the close of the evidentiary hearing, the record was left open for the purpose of allowing the Association representative to submit an affidavit of the Food Service Director or any other employee to rebut testimony offered by the School District witness, to allow the School District to file a responsive affidavit, if necessary, and to allow both parties to submit legal memoranda of law in support of their respective cases. The record indicates that the Association elected to make an opening statement and to submit a written statement and memorandum as an offer of proof. The Association called no witnesses and ended its case upon completion of its opening statement and submission of its statement as an offer of proof.

Upon inquiry by the Hearing Officer, counsel to the School District confirmed his understanding that the rules of evidence would not apply to the administrative hearing. The Hearing Officer then solicited counsel for any objection the School District may have to the acceptance of the Association's statement as an offer of proof. The record indicates that the School District representative stated that, "I have no objection to this

for what it is or that it be received by the Hearings Officer." In not objecting to the Association's submission of its offer of proof, the School District indicated that it was not stipulating to the accuracy of the substance contained within the offer of proof. The Hearing Officer then accepted the Association's written offer of proof and memorandum of law indicating that the weight given to its content would be evaluated accordingly against other evidence that may be presented.

The School District then waived its opening and proceeded to call its first and only witness. At the conclusion of the hearing, the record was left open by agreement of the parties for subsequent submissions by the parties as stated above. It was later closed upon receipt of correspondence from the Association, dated April 24, 2001, stating that it was not going to submit any affidavits and upon subsequent receipt of the School District's own memorandum that lacked any affidavit despite referencing the existence of such an enclosure. The absence of the referenced affidavit was brought to the School District's attention by PELRB staff on or about May 1, 2001. However, no affidavit followed before the record was closed on May 8, 2001.

### **FINDINGS OF FACT**

1. The School District employs persons to carry out certain administrative, support, food service, teaching aide and custodial functions within this public school system and therefore is a public employer within the meaning of RSA 273-A:1 X.
2. The Association seeks to become the exclusive bargaining representative of a proposed bargaining unit comprised of certain employees of the Respondent who perform work within the John Stark Regional School District having properly petitioned the PELRB pursuant to RSA-A:10.
3. All positions proposed for inclusion in the bargaining unit are employed by the School District and are paid subject to a pay plan that provides for varying hourly rates. (See District Exhibits #5 and #6 and Association Exhibit #3).
4. All proposed positions operate within a single organizational unit subject to the directives of a School Principal under the authority of a School Superintendent and under the broader jurisdiction of a district-wide school board. The employees are subject to common work rules promulgated by the School District.
5. The parties agreed to the inclusion of all subject positions with the exception of three part-time positions, namely, a custodian, a food service aide and a guidance secretary as well as a full time Food Service Director.

6. There is no distinction appearing in the job descriptions for Food Service Aides or Food Service Assistants between part-time and full time positions. (School District Exhibits #7 and #8).
7. There is a single description of benefits afforded to Food Service workers and relied upon by both parties that indicates some difference of benefits between the Food Service Director and other food service workers. (School District Exhibit #6 and Association Exhibit #3).
8. There is a single description of benefits afforded to a Guidance Secretary relied upon by both parties that makes no distinction between part-time and full time Guidance Secretaries. (Association Exhibit #3)
9. With the exception of the Food Service Director, all food service workers are employed for thirty-six (36) weeks during the year and all are scheduled to work thirty-five (35) hours weekly except for one Food Service Assistant who is scheduled to work twenty (20) hours weekly. The Food Service Director is scheduled to work an additional two (2) weeks during a given year. (School District Exhibit #5).
10. All those employed as Custodians are scheduled to work fifty-two (52) weeks of forty (40) hours except for one position that is scheduled to work twenty (20) hours weekly. (District Exhibit #5).
11. Other support positions work between thirty-six (36) weeks and fifty-two (52) weeks.
12. The School District's present policy provides, "All Employees over 20 hours per week benefits will be prorated if less than full time." (School District Exhibit #6)
13. All positions subject to the Association's petition receive sick leave, paid holidays and personal leave of varying amounts. (School District Exhibit #6 and Association Exhibit #3). The Food Service Director receives approximately twice the amount of pay and sick leave as other full-time food service workers. (Association Exhibit #3). Medical coverage is not offered to the part-time custodian, part-time food service aide and part-time guidance secretary. (School District Exhibit #5).
14. Arthur Aaronson is the Principal of John Stark Regional High School and has held that position for almost two years and testified that he reports to the Superintendent and School Board.
15. Mr. Aaronson testified that there is little turnover, and no terminations have taken place during his term. However, he offered that the Food Service Director's opinion as to the termination of a food service worker would be

accepted by him and, in turn become his recommendation to the School Board which must approve all terminations.

16. Participation in the hiring process through interviews with prospective employees and receipt of letters of recommendation is reserved to the Food Service Director. (School District Exhibits #3 and #4). Mr. Aaronson testified that he would not hire a food service worker without the concurrence of the Food Service Director.
17. The Food Service Director's job description assigns her the authority to evaluate all kitchen personnel (School District Exhibit #1). Mr. Aaronson testified that while written evaluations have ceased (School District Exhibit #4), unwritten and on-going evaluations are presently provided to him by the Food Service Director when requested.
18. Mr. Aaronson's testimony that he looked to the Food Service Director to be the administrator of the Food Service Unit and be responsible for its complete daily operation is supported by School District. (Exhibits #1, #7 and #8). He also stated that she is responsible for scheduling food service workers.
19. Mr. Aaronson testified that the Food Service Director's personnel responsibilities include: disciplining workers, including admonishing workers and carrying out any discipline; recommending the hiring and firing of workers; and recommending pay raises where appropriate. He further indicated that he would follow those recommendations for raises.
20. Mr. Aaronson also testified that he discusses the job performance of workers with the Food Service Director and discusses confidential personnel matters with her.
21. Mr. Aaronson testified that he considered the Food Service Director a confidential position because he spoke with her confidentially about other employees. He also stated that he believed he would not be negotiating any collective bargaining agreement with the subject unit once it was formed.

### **DECISION AND ORDER**

The Public Employee Labor Relations Board (PELRB) is authorized under RSA 273-A:8 I to determine the composition of bargaining units of public employees. In making its determination it takes into consideration the principle of "community of interest." See RSA-A:8, I. Since the PELRB's determination of the existence or non-existence of this "community of interest" is fact based, additional criteria by which to assess this interest have been promulgated as part of its administrative rules. Pub 302.02. These include the existence a common geographic location for the proposed unit,

common work rules and personnel practices, a common salary structure and fringe benefit structures, and whether or not there is a self-felt community of interest among those to be included in the unit. These are not exclusive criteria, but are promulgated to give notice to parties of the working relationship that is being evaluated.

If the existence of a community of interest is found, only then does the PELRB examine any claimed exclusions, pursuant to RSA-A:8, I and raised specifically in this matter by the School District's objection to the formation of the proposed unit. Here the exhibits that were submitted by both parties and accepted by the Hearing Officer as well as the Association's offer of proof and the limited testimony of a sole witness constituted a meager record, but sufficient enough upon which to make a preliminary finding that a community of interest exists among those positions proposed for the bargaining unit which would mandate examination of the exclusions claimed by the School District.

This finding of a community of interest among employees is based upon the existence of a single set of personnel rules and regulations applying to all workers, upon all these workers being employed in furtherance of the educational mission of John Stark Regional School District and upon all the employees working, in the main, in the high school. Also, it appears from the exhibits entered, that a single payroll structure is in place that emanates from a single entity and that wages are computed on an hourly basis for all employees proposed for inclusion in the unit. In addition, fringe benefits such as, medical insurance, sick leave benefits, paid holidays and personal leave provisions are computed for all except three positions on a pro-rated basis. Those three positions, presently excluded from receiving certain types of fringe benefits, are those who are scheduled to work twenty or less hours weekly. There was no evidence provided that indicated whether or not these individuals, in fact, worked only twenty or less hours each and every week or were required to work regular overtime.

This category of exclusion, *i.e.* the three positions referred to as "part-time", does not create sufficient doubt *per se* to sever their community of interest and exclude them from the proposed unit. The part-time custodian, part-time guidance secretary and part-time food service aide are not employed "seasonally, irregularly or on call." as expressed in RSA 273-A:1, IX (d) and defined in the Appeal of Town of Stratham, 1999 N.H. --. These positions are scheduled to work greater than fifty percent of the hours worked by the majority of the co-workers who are proposed for inclusion in this unit. The three part-time employees work the same number of weeks as the majority of the other positions. The Principal's testimony is that the work force is stable and there have been no terminations during his term and for an indefinite period preceding his appointment. There is no evidence of distinctions between the job qualifications of these three positions and their full time counterparts. Both full time and part-time employees have a reasonably similar, if not identical, expectation of the continuation of their employment from school year to school year. Both appear to perform the same work tasks and duties as their full time counterparts. They are, in short, regularly employed, regularly scheduled and permanent positions working a regular and predictable school year. The PELRB has long held that "part-time status, in and of itself, does not provide a basis for a position's exclusion from a bargaining unit." Epsom Teachers Association/NEA-New Hampshire v.

Epsom School District, (PELRB Decision No. 1995-29); See also Waterville Valley Teachers' Association, NEA-NH v. Waterville Valley School District, (PELRB Decision No. 93-130); Berlin City Hall Employees' Association of Office and Professional Employees International Union v. City of Berlin, PELRB Decision No.93-125. The instant situation does not provide cause to find other than that the part-time positions should be included in the proposed bargaining unit.

The position of Food Service Director presents a more difficult determination due to the lack of testimony of that employee or any other Association witness and to the lack of the post hearing submission of an averred statement contradicting the testimony of Principal Aaronson. While the Association's opening statement and memorandum were accepted as an offer of proof, the weight accorded to any offer of proof must still be measured against that of witness testimony given under oath and genuine documents entered as exhibits. Sworn testimony with supportive documentation must be accorded greater weight unless, apposite the combined weight of other evidence or a witness proven not credible, it strains reasonable credence. Mr. Aaronson was a credible and believable witness.

The School District requests that the position of Food Service Director be excluded from the proposed bargaining unit for two reasons. One reason is its alleged status as a confidential employee. In this regard RSA 273-A:1, IX (c) provides for the exclusion of any employee "whose duties imply a confidential relationship to the public employer." The evidence portrays that the kinds of confidences reasonably believed to be held or that may be held by the Food Service Director are not those that would preclude her from being included in the proposed bargaining unit. The fact that the Principal would discuss other employees with her does not imbue this position with the degree or nature of confidentiality addressed by the statute. Little evidence was put before the Hearing Officer that indicated that the responsibilities of this position would deal with confidential labor relations material or would require participation in formulating management negotiation proposals. The confidential relationship that may be subject to the statutory exclusion springs from activities that are related to collective bargaining, negotiating and the like, not merely discussions about other employees. Were the exclusion of the Food Service Director to be predicated on the basis of RSA 273-A:1, IX (c) solely, it would fail. See Appeal of the City of Laconia, 135 NH 421 (1992).

However, the School District also requests that the position of Food Service Director be excluded for a second reason, because it is an "administrator". The controlling statute, RSA 273-A, does not recognize the term "administrator" as having any special status *vis a vis* the determination of the appropriateness of a position within a proposed bargaining unit. At the outset of the hearing the School District delineated its objection to the Food Service Director's inclusion in the proposed bargaining unit more fully. It outlined its case sufficiently to allow the Association to understand that it was the supervisory authority of one considered a management or administrative employee that was at issue and to allow the Association to make a decision whether or not to proceed or elect a continuance. The Association elected to proceed. Thereafter, an offer of proof was submitted, direct testimony was given, cross-examination, re-direct examination and re-

cross examination of Principal Aaronson was undertaken, exhibits admitted and memoranda of law provided, all of which clearly indicated that both parties understood the relevance of RSA 273-A:8, II to these proceedings. That provision of the statute provides in relevant part that "Persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise." It is the PELRB that is vested with the discretion to delineate which employees are "supervisory" Appeal of City of Concord (1983) 123 N.H. 256.

When the PELRB is asked to examine exclusions based upon a supervisory relationship, it looks for guidance to a standard established by the court, *inter alia*, which provides that "A supervisory relationship exists when the supervisor is genuinely vested with significant supervisory authority that may be exerted or withheld depending on his or her discretion." Appeal of East Derry Fire Precinct, 137 NH 607,610 (1993). The court has recognized that there are many factors that are considered in determining whether a job position warrants exclusion based upon its supervisory status. Several that have been specifically mentioned include the authority to evaluate, the supervisory responsibilities and the authority to discipline. Appeal of the Town of Stratham, 144 N.H. - - (1999), citing Appeal of East Derry Fire Precinct, 137 N. H. 607,611. (1993).

The weight of the evidence in this case indicates that the Food Service Director supervises the operation of the food service unit and all employees working in that service. The testimony indicates that the Food Service Director has personnel responsibility and holds the authority to admonish workers and carry out appropriate discipline, to participate in the hiring and firing of food service workers, and to recommend pay raises. The Principal further indicated that he would normally follow those recommendations for pay increases. The Principal also indicated that the Food Service Director has the authority to schedule workers and to provide evaluative statements to him upon request. Indeed the position job description specifically includes reference to supervisory authority and evaluation responsibility. The Principal testified that he would not consider hiring or firing a food service worker without the participation of the Food Service Director. In sum, the Food Service Director apparently exercises broad supervisory powers within her work unit and is given wide latitude to manage its operation. Such factual evidence is sufficient to meet the test of qualifying as supervisory authority calling for the "significant exercise of discretion" by the Food Service Director and therefore serves to exclude her from the proposed bargaining unit.

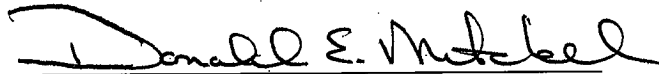
For the reasons stated herein, it is determined that the appropriate bargaining unit is to be composed of full time and part-time Aides, Teacher Assistants, Custodians, Food Service Assistants and Food Service Aides, Secretary/clerks, including the Guidance Secretaries, Secretary/Receptionist, Secretary/Bookkeeper, Special Education Secretary and the Pupil Data position listed on School District Exhibit #5.



Therefore, an order of election shall issue and an election shall be conducted to determine if the designated unit chooses to be represented by the John Stark Support Personnel Association/ NEA-NH in accordance with RSA 273-A:10 and PELRB Rule Pub 303.

So ordered.

Signed this 9<sup>th</sup> day of May, 2001.

A handwritten signature in black ink, appearing to read "Donald E. Mitchell", written over a horizontal line.

Donald E. Mitchell, Esq.  
Hearings Officer